IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 719 OF 1987

Tushar Tanna .. Applicant.
vs.
The Commissioner of Income-tax. .. Respondent.

WITH .
INCOME TAX REFERENCE NO. 62 OF 1990.

Shri Deepak Tanna. .. Applicant.
vs.
The Commissioner of Income-tax. .. Respondent.

WITH

INCOME TAX REFERENCE NO. 38 OF 1992.

Dipak Jyoti & Arati Trust .. Applicant.
vs.
The Commissioner of Income-tax. .. Respondent.

Shri P.J. Pardiwala withB.D. Damodar i/b Kanga & Co. for the Applicant.

Shri Ashok Kotangale for the respondents.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

DATED : 13.10.2005.

ORAL JUDGMENT: (Per V.C. Daga,J.)

. The sole question common to all the references is based on identical facts, arising out of common order passed by the Income Tax Appellate Tribunal, Mumbai, ('The Tribunal' for short) for the A.Y. 1980-81, in relation to the assessees, who happened to be members of the same family. The question referred by the Tribunal for our opinion reads as under:

" Whether on the facts and in the circumstances of the case, the Appellate Authority was justified in holding that the profit earned on sale of gold bonds arose from an adventure in the nature of trade and was, therefore, liable to tax as Business Income.?

The Facts:

2. The facts in these references revolve around transaction which is practically identical in case of each assessee. The factual matrix of which is not in dispute. The consolidated facts narrated hereafter, taken from the statement of facts forwarded by the Tribunal, are as under:

3. Shri Tushar N. Tanna, HUF on 30.11.1978 entered into a contract for the purchase of 2% National Defence Gold Bonds 1980 ('NDG Bond' for short) worth 1300 gms of Gold at the rate of Rs. 640/- per 10 gms. The delivery of NDG Bonds was, however, not taken for quite some time. In the meantime, the price of NDG Bonds had shown upward trend in the market. Each of the five assessees in the circumstances, thought it better to opt for purchase of NDG Bonds.

4. The 2% NDG Bonds which were not exempt from the estate duty, were delivered to Andhra Bank, which was the banker of M/s S.D. Javeri, broker

through whom the gold bonds were purchased by the assessees. Here it will be necessary to point out that except in the case of Shri TusharT. Tanna HUF, where these NDG Bonds were delivered by the Andhra Bank to Syndicate Bank, i.e. the assessee's banker, in all other cases the gold bonds remained with the Andhra Bank. The date of delivery of NDG Bonds, which was said to be the said date of payment, was 24.1.1979 in case of Shri Tushar T. Tanna HUF and 4.1.1980 in the case of other four assessees.

5. These gold bonds were sold on 4.1.1980 at the rate of Rs. 1500/- per 10 gms.in the case of Shri Tushar T. Tanna HUF and on 8.1.1980 in the case of the other four assessees at the rate of Rs.1550/- per 10 gms. There was thus a profit on the sale of these gold bonds, in the sum of Rs. 1,11,800/- in the case of Shri Tushar T. Tanna, (HUF), Rs. 1,36,000 each in the case of Shri Tushar T. Tanna-individual, Shri Tulsidas J. Tanna, and Rs. 2,72,000/- each; in the cases of Shri Laxmikant J. Tann and Shri K.J. Tanna.

6. It was claimed before the Income Tax Officer that the profit on sale of these gold bonds would fall under the head Capital Gains and was, therefore, exempt from tax in view of Government Notification No. F.4 (29)-W & M/65 dated October

19,1965 (58 ITR Statutes 61).

7. The Income Tax Officer, however, held that the purchase and sale of NDG Bonds was an adventure in the nature of trade and, therefore, profit arising from the purchase and sale of these bonds amounted to business income. He, therefore, did not accept the assessee's claim of exemption on the profits earned on the sale of these gold bonds and subjected it to tax along with the other incomes in the assessment order.

8. When the matter came up before the Appellate Tribunal in appeal at the instance of the assessees, the appellate Tribunal agreed with the findings recorded by the Assessing Officer The findings recorded by the authorities below can be summarised as under:

. "The NDGB were purchased on 24.12.1979 in the case of Tushar T. Tanna HUF and on 4.1.1980 in the case other four four assessees.

. That the aforesaid NDGB were due for maturity on 27.10.1980.

. That considering short life of the bond at the time of purchase they could not have purchased

with a view to make investment.

. The NDGB according to the Scheme itself provided for a return of only Rs. 2 per annum per 10 gm. which was a ridiculous low return on investment and is even lower than the return on savings bank account interest from where the money is said to have been diverted for the purposes of making the purchases.

. Considering all this and looking to the totality of the facts and circumstances purchase and sale of NGDB under consideration in the case of each of the five assessees was an adventure in the nature of trade.

. The profit arising from this adventure was, therefore profit from business within the meaning of business as laid down under section 2(13) of the Income-Tax Act."

. The aforesaid findings are the subject matter of debate whether purchase and sale of NDGB were purchased as a capital investment or adventure in the nature of trade.

Submissions :

7. Shri P.J. Pardiwalla learned Counsel

appearing for the all the assessees urged that in deciding the character of such transactions several factors which are judicially recognised over the years are required to be taken into account while deciding the nature of the transaction. In his submission, if all these aspects were taken into account and applied to the facts of the case at hand by the Tribunal as such the view taken by the Tribunal needs to be respected .

8. Shri Pardiwalla submits that from the fact that the NDG Bonds were sold by all the assessees within a short span of time cannot be said to be a sufficient circumstance for the purpose of coming to the conclusion that the transactions in question were adventure in the nature of trade.

9. Shri Pardiwalla, learned Counsel to support the order of the Tribunal relied upon various decisions of the Supreme Court and various High Courts, including that of this Court which are consistent with the submissions which he has canvassed. In all fairness, he also brought to our notice 1 or 2 judgments which are running counter eto this line of submissions advanced by him.

10. Learned Counsel appearing for the Revenue

could not do well in replying the submissions except reiterating the findings recorded by authorities below, which were in favour of the Revenue.

. In order to unlock the questions involved herein, it is necessary to look into the various decisions rendered by the Apex Court.

11. The judgment of the Supreme Court in the case of **G. Venkatswami Naidu and Co. vs. CIT (1959) 35 ITR 594** laid down certain tests for determining whether in a given case a transaction can be looked upon as an adventure in the nature of trade. It said (Head Note):

> ." In deciding the character of such transactions several factors are relevant, such as e.g., whether the purchaser was a trader and the purchase of the commodity and its resale were allied to his usual trade or business or incidental to i; the nature and quantity of the commodity purchased and resold; any act subsequent to improve the quality of the commodity purchased and thereby make it more readily resaleable; any act prior to the purchase showing a design or purchase;the incidents associated with the purchase and resale, the similarity of the transaction to operations usually associated with trade or business; the repetition of the transaction; the element of pride of possession."

. The Supreme Court in the above case also laid down that, in a given case, even an isolated transaction can satisfy the description of an adventure in the nature of trade provided at least

some of the essential features of trade are present in the isolated or single transaction.

12. The next judgment of the Supreme Court in line is the decision in the case of Saroj Kumar Mazumdar v. CIT (1959) 37 ITR 242, wherein majority judgment held that where a transaction was an isolated or single transaction bereft of the line of business of the assessee, the onus lies on the Department to prove that transaction was an adventure in the nature of trade with the sole intention of selling it later at a profit. Applying this test, Apex Court held that at the time he entered into the agreement with the society the appellant was doing good business, as was shown by the large amounts on which he was assessed to tax, it was not unnatural for him to look forward to continue his business in as prosperous a way as he had been doing in the recent past, and to raise sufficient funds to build his own residential house or to construct a workshop for his own engineering business; and therefore, the probability that the site might appreciate in value did not necessarily lend itself to the inference that the transaction was a venture of trade, as distinguished from a capital investment and that the transaction was not an adventure in the nature of trade and the amount was not assessable to tax under section IO of the

Income-tax Act.

13. The third judgment of the Supreme Court in line is the judgment in the case of Janki Ram Bahadur Ram vs. CIT, (1965) 57 ITR 21, whrein the Supreme Court observed as under:

> " No useful purpose would be served by entering upon a detailed analysis and review of the observations made in the light of the relevant facts, for no single fact has decisive significance, and the question whether a transaction is an adventure in the trade must depend upon the collective effect of all the relevant materials brought on the record."

. The Supreme Court in this case made a distinction between transactions in commercial commodities and transactions on purchase of land distinguishing the transactions on purchase of land from the cases dealing with commercial commodities.

It was observed thus:

> " But a transaction of purchase of land cannot be assumed without more to be a venture in the nature of trade:

24. The Supreme Court also emphasised that (at page 26)"

> . ..... a profit motive in entering into a transaction is not decisive,

> for an accretion to capital does not become taxable income, merely because an asset was acquired in the expectation that it may be sold at profit." In Raja Bahadur Kamakhya Narain Singh v. CIT (1970) 77 ITR 253, the Supreme Court again reiterated that (at page 262): " Where a person in selling his investment realises an enhanced price, the excess over his purchase price is not profit assessable to tax."

It was observed:

> . If the transaction is in the ordinary line of the assessee's business there would hardly be any difficulty in concluding that it was a treading transaction, but where it is not, the facts must be properly assessed to discover whether it was in the nature of trade. The surplus realised on the sale of shares, for instance, would be capital if the assessee is an ordinary investor realising his holding; but it would be revenue if he deals with then as an adventure in the nature of trade. The fact that the original purchase was made with the intention to resell if an enhanced price could be obtained is by itself not enough but in conjunction with the conduct of the assessee and other circumstances it may point to the trading character of the transaction."

In Khan Bahaur Ahmed Alladin and sons vs. CIT (1968) 68 ITR 573, the Supreme Court reiterated (at page 581):

> " It is not possible to evolve any legal test or formula which can be applied in determining whether the transaction is in an adventure in the nature of trade or not. The answer to the question must necessarily depend in each case on the total impression and effect of all the relevant factors and circumstances proved therein and which determine the character of transaction."

14. Shri Pardiwala also referred to judgments of various other High courts including that of the Madras and Kerala High Courts. In the case of CIT vs. Bhandari & Co. (1985) 152 ITR 687, the Madras High Court was dealing with the case where assesee had declared loss in purchase and sale of National Defence Remittance Certificates. The I.T.O. had held that the loss in that case arising out of sale of the certificates could only be treated as having arisen out of the transfer of a long-term capital asset. The C.I.T.(A) agreed with the view of the ITO. The Tribunal, however, held that purchase and sale of the certificates were not solitary transactions and that the sale and purchase of the certificates having occurred during the normal course of the assessee's business, the loss should be treated as a business loss. Reversing this finding on reference, the Madras High Court held that the assessee had purchased the certificates from different parties and sold them later to other parties could not by itself establish that it was a line of business that was carried on by the assessee

apart from its usual business import and export.

15. Further sec. 2(44) inserted in the Act by the Finance Act of 1966, with effect from 1st April 1966, which excludes the certificates in question from the purview of short term capital asset. Consequently, the loss arising out of the transfer of certificates was taken to be the loss arising out of the sale of long-term capital assets that is how, the Madras High Court refused to treat it to be a business loss.

16. The Kerala High Court in the case of Michael A. Kallivayalil vs. CIT (1976) 102 ITR 102 was dealing with an assessee who was owning 1000 acres of land and derived income by owning and managing estates. In 1958, he entered into an agreement to buy 575 acres of land and borrowed money for making the purchase. Subsequently, he sold 225 acres of land out of it and made a profit. The tribunal held that the sale transaction amounted to an adventure in the nature of trade because: (i) the assessee had borrowed money for purchase (ii) he intended to resell the land at a profit and (iii) at the time of making the sale the assessee was under no dire necessity to sell. On reference the Kerala High Court held that the Tribunal was not justified in holding that the sale of the land by the assessee

represented an adventure in the nature of trade. The High Court held that the fact that the assessee had borrowed money for purchasing the land or that he intended to resell it at profit would not necessarily mean that the transaction was an adventure in the nature of trade. The assessee who had bought land was an estate owner who already the owner of the thousand acres of land and was making his living by managing estates. He never entered into the transaction of purchase of land or estates, as such it was held that income shown could not be said to be business income.

17. Shri Pardiwalas also relied upon judgments of this Court in the case of Ashok Kumar Jalan v. CIT (1991) 187 ITR 316; CIT vs. Dhable, Bobde Parose, Kale, Lute and Choudhari (1993) 202 ITR 98; CIT vs. Mahavirprasad R.MoraRKA (1992) 193 itr 530, to support his contentions.

. In CIT vs. Asian Dry Dock Co. (1977) 108 ITR 822, this Court had also observed that in determining whether a transaction is an adventure in the nature of trade it is the total effect of all the facts and circumstances that have to be considered. The same principles have been reiterated by this case in the case of CIT vs. Radheshyam R. Morarka (1981) 127 ITR 111 anf in CIT

v. V.A. Trivedi (1988) 172 ITR 95.

18. Shri Pardiwalla, as already stated hereinabove, brought to our notice one more judgment of this Court in the case of Tribhuvandas Vallabhdas vs. CIT, Bombay South, (1966)41 ITR 518, wherein the assessee HUF had carried on the business of commission agency and money lending but did not carry on business of its on account. It purchased 111 silver bars out of which 5 were used for making utensils and after 7/8 years, remaining were sold on profits. . Dealing with this transaction, the Division Bench of this Court held that the purchase of silver bars was not with the intention of making investment and the sale of the bars was not for the purpose of any need or under pressure. Transaction of purchase and subsequent sale at profit raised a very strong presumption that it was an adventure in the nature of trade. Further as the purchase was made at the beginning of the war which was expected to cause a rise in the price of silver and sale was effected at the time when event had come to an end., it was cl,ear that the object of purchase by him a seems to be to take adventage of an opportunity that had occurred to enter into a transaction and make a profit out of it, and the profits from resale were right held to be income and assessable as such to income tax.

19. Having taken survey of various cases cited at the Bar, in our view the following principles emerge to find out whether or not the transaction in question is an adventure in the nature of trade:

(i). No principle can be laid in deciding whether person is indulging in business in the nature of trade.

(ii). Whether transaction is isolated one or forms part of series of transactions showing transaction to be in the nature of adventure in trade.

(iii). The fact that the property was sold within short time by itself does not indicate that transaction was in the nature of adventure in trade.

(iv). Property was purchased with intention to investment and not in adventure in the nature of trade.

(v). It is not a case on merely on facts and circumstances of the case. To consider their distinctive character in each case.

Consideration:

21. Considering the aforesaid parameters culled out from various cases, let us turn to the facts of case at hand which is little close to the case of Ashok Kumar Jalan. (cited supra), Let us find out facts of that case. In that case, Ashok Kumar Jalan had purchased the bonds on 3rd April 1980 and were sold only in October 1980. He made profit of Rs. 33,500/- and claimed that it was not taxable. The Income tax Officer brought the amount of Rs. 33,500/- to tax as income from an adventure in the nature of trade. This finding was upheld by the Appellate Assistant Commissioner and the Tribunal. On reference, the High Court held that there was no material to establish that the only motive of the assessee in purchasing the bond was to sell them at a profit at a later date. The assessee had not purchased very large quantities. The assessee had the means to pay for the bonds and in fact he paid for them. It was, therefore,held that transaction of purchase and sale of NDGB did not amount to an adventure in the nature of trade and, therefore, the amount of Rs. 33,500/- was not taxable as income from business.

22 . Having noticed various cases and having

taken survey of divergent views, it is not in dispute that the NDG Bonds which were purchased were sold by the assessees in a very short span of time. The transaction in question involved in each case is an isolated one and did not form part of series of transaction. None of the transations are from the line of business persued by each assessee. Tulsidas Tanna entered into contract dated 15.5.1979, took delivery of bonds on 4.1.1980 and sold it on 8.1.1980 making profit of Rs.36,000/- on the sale of gold bonds. The transaction in question reveals that the payment was made and delivery of bonds was taken after six monthss though they were sold within 4 days from the date of delivery but that itself cannot be a ground to hold that the asessee has indulged in the transaction in the nature of advnture. Similar are the facts of the case of Kalyanji Tanna and Lamikant Tanna whereas the case of Shri Tushar Tanna (HUF) is on a better footing so far as admitted fact of showing purchase of bonds on 30.11.1978 whereas delivery was taken on 24.12.1979 that is almost after one year whereas sale is on 4.1.1980. Initially, intention appears to be of investment because in some cases purchase price was paid almost after one year . However, delivery was taken after a period of one year. Though, after taking delivery within a short span of 4/5 days, bonds were sold. The fact that the bonds were sold

within a short time, does not indicate that transaction was in the nature of trade. There does not appear to be any material to show that only motive was to show that bonds were sold at a later date. Purchase of bonds was not in much quantity. As such, there is no material to conclude that the transaction in question was an adventure in the nature of trade.

. In the circumstances, question refered for our opinion is answered in favour of the assessee and against the revenue.

(J.P. DEVADHAR,J.) **(V.C.DAGA,J.)**